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No. 96-808

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PENNSYLVANIA NURSES ASSOCIATION,
Petitioner,
v.
PENNSYLVANIA STATE EDUCATION ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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PARTIES

In addition to the parties identified in the caption of the case, the following individuals were parties to the proceeding in the court below: Debra Ferguson, Richard Lewis, Jeffrey Lewis, Karen Schrader, Alfred Nelson, Jr., and Thomas Ferguson. These individuals are respondents in this proceeding pursuant to Rule 12.6, and this Brief in Opposition is filed on their behalf as well as on behalf of respondent Pennsylvania State Education Association.

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BRIEF IN OPPOSITION

Respondents Pennsylvania State Education Association ("PSEA"), *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Pennsylvania Nurses Association ("PNA"). As we explain below, the Petition should be denied because:

1. The Third Circuit reached the question as to which PNA seeks review only in connection with the alternative, and secondary, basis for its decision, and the outcome in the court below would not be changed even if that question was answered in PNA's favor (REASONS FOR DENYING THE WRIT, Part I);
2. In answering the question as to which PNA seeks review, the Third Circuit applied well-established law to the facts of this case (REASONS FOR DENYING THE WRIT, Part II); and

3. PNA does not contend that there is a conflict among the Circuits with regard to the primary basis for the Third Circuit's decision, and there is no conflict even with regard to the question as to which PNA seeks review (REASONS FOR DENYING THE WRIT, Part III).

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

In this case, PNA alleges that PSEA and the six individual respondents have committed a variety of state-law torts—Breach of Fiduciary Duty (Count I), Fraud and Deceit (Count II), Defamation (Count III), Commercial Disparagement (Count IV), Unfair Competition (Count V), Vicarious Liability (Count VI), Interference with Contractual Relations (Counts VII, VIII, and IX), Aiding and Abetting (Count X), and Conspiracy (Count XI). Because this case was decided on a motion for judgment on the pleadings, we accept as true the allegations in the Complaint and set them forth in this Statement as "facts," although many of these allegations are denied in defendants' Answer.

PNA and PSEA are both labor organizations within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, which seek to organize and represent, for purposes of collective bargaining, employees of, *inter alia*, health-care facilities in Pennsylvania and Delaware. During the period when most of the events at issue in this case took place, four of the individual respondents were employed as "labor representatives" by PNA. Subsequently they became employees of PSEA. The other two individual respondents were at all relevant times employees of PSEA.

This case has its genesis in a campaign by PSEA to replace PNA as the exclusive collective bargaining representative for nurses employed at eight health-care facilities in Pennsylvania and Delaware. Five of these facilities are

private-sector institutions, at which PNA was recognized as the exclusive representative pursuant to the NLRA, while the other three (two in Pennsylvania and one in Delaware) are public-sector institutions, at which PNA was recognized as the exclusive representative pursuant to the applicable state labor-relations statutes.

PNA's status as the exclusive collective bargaining representative at the eight health-care facilities appears to have been particularly vulnerable to "raids" by competing unions, and recognitional challenges took place in 1993 at all of these facilities (as well as at others—not involved in this case—at which PNA also was the exclusive representative). PSEA replaced PNA as the exclusive representative at four facilities, three facilities were taken over by other unions, and PNA was able to retain its status at one facility.

Although cast in the language of tort, PNA's Complaint amounts to a challenge to the campaign undertaken by PSEA to replace PNA as the exclusive collective bargaining representative at these eight health-care facilities. Thus, the Complaint alleges that four of the individual respondents, while employed by PNA, acted as agents of PSEA to persuade the members of the bargaining units for which they had responsibility to switch their support from PNA to PSEA. These employees (who subsequently became employees of PSEA) are alleged, in concert with PSEA and the other individual respondents, to have taken certain actions that facilitated PSEA's effort to replace PNA as the exclusive representative at these facilities.[1] PNA avers in its Complaint that respondents' "purpose and intent" in taking these actions was "to displace PNA

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[1] The actions allegedly taken include delaying or undermining contract negotiations so that PNA's existing collective bargaining agreements would expire without replacement; concealing the status of the contract negotiations from PNA's leadership; making false statements to bargaining unit members about the effectiveness of PNA; and generally soliciting support for PSEA.

as the exclusive bargaining agent for the nurses at [PNA's] locals."

B. Proceedings Below

PNA filed its Complaint in the Court of Common Pleas of Dauphin County, Pennsylvania, on May 14, 1994. Respondents removed the case to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1441, and subsequently moved, on preemption grounds, for judgment on the pleadings with respect to all counts in the Complaint. The district court (Hon. William W. Caldwell) granted the motion in part, denied it in part, declined to reach certain state-law issues, and—having disposed of all federal questions—remanded the remaining claims to the state court pursuant to 28 U.S.C. § 1367(c)(3). Petitioner's Appendix ("App.") A-37-54.

Applying the test of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), as more recently set out in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the district court held that Counts II, IV, V, VI, VII, VIII, IX, X and XI—to the extent that they are based on conduct at private-sector facilities governed by federal labor law—are within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"), and thus preempted by the NLRA. The court held, however, that Count III is not preempted by the NLRA, and it rejected respondents' contention that Count I (and also, as an alternative argument, Count II) is preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The court declined to rule on respondents' further contention that Counts II-XI, to the extent that they are based on conduct at public-sector facilities governed by state law, come within the exclusive jurisdiction of the Pennsylvania and Delaware administrative agencies responsible for public-sector labor relations, and are preempted by the state counterparts to the NLRA. The court instead remanded those issues to the state court.

Both sides appealed to the United States Court of Appeals for the Third Circuit, which on July 25, 1996, affirmed the district court's judgment on the federal issues in its entirety. App. A-1-21.[2] In an opinion by Chief Judge Sloviter, the court began by setting out the following framework for analysis:

> [S]tate regulations and causes of action are presumptively preempted if they concern conduct that is *actually or arguably either prohibited or protected by the Act*. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects.

App. A-8 (quoting *Belknap*, 463 U.S. at 498-99) (emphasis added by Third Circuit). Applying that framework, the court first held that the conduct of which PNA complains was "arguably prohibited" by NLRA Section 8(b)(1)(A)—which makes it an unfair labor practice for a union or its agents "to restrain or coerce . . . employees" in the exercise of their rights under NLRA Section 7 to organize and choose their own exclusive collective bargaining representative, App. A-9-10—and under NLRA Section 9, which gives the NLRB jurisdiction over the selection of exclusive representatives. App. A-10.

The court below then addressed the two well-established exceptions to the preemption doctrine. It had little difficulty in holding that the conduct in question could not be characterized as of "peripheral concern" to the NLRA,

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[2] The district court's refusal to decide the state-law preemption issues was not appealed.

inasmuch as it "involves the core activities with which the Act is concerned: union organizing and the employees' election of an exclusive bargaining representative." App. A-11. The court also held that the second exception did not apply:

> A least with regard to the nine claims which the district court found preempted (Counts II, IV, V, VI, VII, VIII, IX, X and XI), PNA has not demonstrated that any of these falls within the category of claims which the Court has determined "touch[] interests deeply rooted in local feeling and responsibility." *Belknap*, 463 U.S. at 498. Although PNA claims that "in a free market economy that places economic actors in competition with one another, the states have a substantial interest in policing the market to ensure that free competition does not degenerate into the law of the jungle," Appellant's Brief at 40, when the competition is between unions such matters are the particular concern of the NLRA. PNA has cited no authority supporting its argument that market regulation of competing labor organizations is a matter so rooted in local concern as to prevent preemption by the federal labor laws.

App. A-12.

Having concluded on the basis of the foregoing analysis that the state-law tort claims in question were preempted, the court went on to demonstrate how the same result was required under an alternative analysis. "Even were we to conclude," said the court, "that the issue presented is one of particular state concern," *id.*, the balancing test that then would be called for between that state concern and potential interference with the regulatory jurisdiction of the NLRB *also* would result in a holding that PNA's claims were preempted. *Id.* at A-12-15. In this context, the Third Circuit addressed the question, articulated in *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978), "whether the controversy presented to the state court is identical to . . .

or different from . . . that which could have been, but was not, presented to the Labor Board." App. A-13 (quoting *Sears*, 436 U.S. at 197). The court found that "[i]n the instant matter, much of the conduct forming the basis of the state tort claims also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding." App. A-13. Thus, "PNA's state claims would overlap with NLRB issues," App. A-14, and the case was therefore distinguishable from this Court's precedents in *Sears* and *Belknap*:

> In the case before us, . . . the allegations that PSEA and the individual defendants sought to undermine PNA and influence the outcome of the nurses' representation election would be the focus of both the unfair labor practice charges and PNA's state-law claims. The risk of conflicting rulings and interference with Board enforcement of national labor policy is evident.

App. A-15.

In reaching this conclusion, the Third Circuit "reject[ed] PNA's attempt to replace the well-established *Garmon* analysis with an 'identical controversy' test for preemption." *Id.*[3] Responding to PNA's contentions in this regard, the court observed that this Court repeatedly has held "that the fact that the NLRB cannot provide damages as a remedy is an insufficient reason by itself to warrant holding preemption inapplicable," *id.* at A-16 n.3 (citing *Local 926, Int'l Union of Operating Eng'rs v.*

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[3] In an effort to support its position that there is a need for clarification by this Court, PNA attributes to the Third Circuit the view "that preemption decisions of this Court 'have been somewhat unclear.'" Petition at 12 (quoting App. A-16). In point of fact, the Third Circuit was referring, without approbation, to the observation of "a respected commentator," as a predicate for its counterobservation that there was no justification for abandoning "the analytical framework of *Garmon* and *Belknap*." App. A-16.

Jones, 460 U.S. 669, 684 (1983); *Garmon*, 359 U.S. at 246-47), and that "a Board proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted." App. A-17. Accordingly, the court declined PNA's implicit invitation "to abandon more than half a century of federal policy that places exclusive jurisdiction over issues of national labor relations in the hands of the agency created by Congress to deal with them." *Id.*[4]

REASONS FOR DENYING THE WRIT

I. BECAUSE THE THIRD CIRCUIT REACHED THE QUESTION AS TO WHICH PNA SEEKS REVIEW ONLY IN CONNECTION WITH THE ALTERNATIVE, AND SECONDARY, BASIS FOR ITS DECISION, THE OUTCOME IN THE COURT BELOW WOULD NOT BE CHANGED EVEN IF THAT QUESTION WAS ANSWERED IN PNA'S FAVOR

There is no dispute about the three-prong test that this Court has established in *Garmon* and its progeny for determining when state-law claims are preempted: (1) the initial question is whether the conduct upon which the claims are based is arguably protected or prohibited by the NLRA; (2) if the answer to this question is "yes," the claims are preempted unless either of two exceptions is applicable—*i.e.*, the conduct at issue (a) is of only "peripheral concern" to federal labor law, or (b) "touches interests deeply rooted in local feeling and responsibility," *Belknap*, 463 U.S. at 498; and (3) if one of these exceptions does apply, the court then must balance the state and federal interests involved. This is the test that the

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[4] On matters that are not before this Court, the Third Circuit also affirmed the district court's holdings that (1) under *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), PNA's defamation claim is not preempted, App. A-17-19; and (2) LMRA Section 301 does not preempt Counts I and II of PNA's Complaint. App. A-19-21.

Third Circuit applied, *see* App. A-8, and it is also the test that PNA sets out in the very first paragraph of its argument to this Court. *See* Petition at 10-11.

Applying this test, the Third Circuit first held, as we noted above in the Statement of the Case, that the conduct of which PNA complains in Counts II and IV-XI is "arguably prohibited" under NLRA Sections 8 and 9. App. A-9-11. The court then concluded that PNA's claims do not fall within either the "peripheral concern" or the "local feeling and responsibility" exception. App. A-11-12.[5] With that, the Third Circuit had resolved the preemption issue before it—although the court nonetheless continued its analysis by offering an alternative route to the same result, holding that "[e]ven were we to conclude" that one of the exceptions applied, the balancing test would still result in preemption. App. A-12-15.

PNA's Petition does not call into question either of the Third Circuit's two initial conclusions. Rather, after correctly laying out the appropriate framework, PNA proceeds directly to the third prong of the test, arguing that "*in determining whether the risk of interference outweighs the state's interests,* the key inquiry or test is whether the controversy presented in court is 'identical to' or 'different

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[5] PNA's review of the Third Circuit's opinion leaves out this step of the court's analysis. After correctly noting the court's statement that "[*i*]*f* the conduct is only of 'peripheral concern' to the NLRA, or 'touches interests deeply rooted in local feeling and responsibility,' the interests of the state in controlling and remedying the conduct must be balanced against the risk of interference with the NLRB's authority to adjudicate controversies committed to it by the NLRA," Petition at 8-9 (emphasis added), the Petition continues: "Accordingly, the Third Circuit set out to ascertain whether there would be a risk of interference with the NLRB's jurisdiction if PNA's state law claims were permitted to proceed in state court." *Id.* at 9. The Petition thus skips entirely over the Third Circuit's conclusion that neither of the two exceptions applies, as well as its introductory phrase ("Even were we to conclude . . .") that makes clear the alternative context in which it reached the balancing test.

from' the controversy that could have been (but was not) presented to the NLRB." Petition at 11 (emphasis altered). PNA's entire argument is addressed to this question. The Petition, in other words, concedes the primary basis on which the Third Circuit held that its state-law tort claims are preempted, and seeks review only of the court's *alternative* holding that application of the balancing test, in any event, would result in preemption of PNA's claims.

In sum, even if the question that PNA asks this Court to review—involving the third prong of the preemption test—were to be answered in PNA's favor, that answer would not alter the decision of the court below. For this reason alone, PNA's Petition should be denied.

II. THE ALTERNATIVE, AND SECONDARY, BASIS FOR THE THIRD CIRCUIT'S DECISION REPRESENTS AN UNEXCEPTIONAL, AND FAITHFUL, APPLICATION OF WELL-ESTABLISHED LAW TO THE FACTS OF THIS CASE

The question that is raised by PNA in its Petition involves the applicability of the third prong of the preemption inquiry. Specifically, PNA contends that the Third Circuit misapplied what it terms the four-pronged "*Sears* 'identical controversy test,' " Petition at 9, when the court concluded that allowing PNA to proceed with its state-law tort claims potentially would interfere with the regulatory jurisdiction of the NLRB. Because, as indicated in Part I, a reversal of the Third Circuit in this regard would not alter its ultimate preemption holding, the question raised by PNA does not provide a basis for granting review in this case. But PNA in any event is wrong: the "identical controversy" test that it posits finds no basis in the relevant Supreme Court precedents, and the Third Circuit's decision constitutes an unexceptional, and faithful, application of the third prong of this Court's preemption test.

As explained above in the Statement of the Case and in Part I, the Third Circuit applied the preemption analysis that this Court has set out in *Garmon* and its progeny: the court first determined that the conduct upon which PNA's claims were based was "arguably prohibited" under NLRA Sections 8 and 9, and then concluded that the conduct did not fall within either the "peripheral concern" or the "local feeling and responsibility" exception. In the alternative, the court held that balancing state concerns against potential interference with the jurisdiction of the NLRB also would require preemption, because "much of the conduct forming the basis of the state tort claims also underlies the potential unfair labor practice charges, and the same facts would need to be determined in each proceeding." App. A-13.

PNA contends that the Third Circuit erred in balancing these interests by failing to apply a four-pronged test that PNA claims to have distilled from this Court's cases. PNA offers no citation in support of this test, which, as the Third Circuit observed, appears to have been cobbled together from "a statement in *Sears* and fragments of statements from other Supreme Court cases where the Court found no preemption." App. A-15. The Third Circuit was entirely correct in refusing to apply it.

PNA nowhere takes issue with the Third Circuit's fundamental conclusion that the facts and issues to be determined in PNA's state-law tort claims and in the potential NLRA claims overlapped so significantly that these were, in essence, the same controversy. App. A-13-15. Instead, PNA argues that the court should also have taken into account the "interests to be protected" and the remedies available in each forum. Petition at 11. PNA does not explain what it means by "interests." If the reference is to the state's interest in upholding its tort law, the Third Circuit did indeed properly take account of this "interest" in its inquiry into whether the conduct at issue "touches on interests . . . deeply rooted

in local feeling and responsibility." App. A-11 (quoting *Jones*, 460 U.S. at 676). If, on the other hand, PNA's reference is to the differing legal rights protected by state tort law and the NLRA, the "interests to be protected" are by definition not the same, and, as both courts below properly recognized, the identity *vel non* of these interests could not possibly be an appropriate basis for deciding whether to allow the state-law claims to proceed:

> As the district court recognized, a Board proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted. This would require us to abandon more than a half a century of federal policy that places exclusive jurisdiction over issues of national labor relations in the hands of the agency created by Congress to deal with them.

App. A-17.

That leaves the matter of remedies, which indeed appears to be PNA's primary concern.[6] Again, PNA's emphasis on this factor is misplaced. While it is true that PNA could not obtain in an NLRB proceeding the $1.3 million in damages that it seeks in this lawsuit, that is precisely the point of federal preemption. As this Court has made clear, federal labor law determines not only what conduct is sanctionable, but also what sanctions are to be imposed for such conduct. Permitting the states to award damages far exceeding the sanction Congress has deemed appropriate for violations of federal labor law

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[6] Indeed, PNA's statement of the Question Presented focuses principally on whether an adequate remedy is available under federal labor law: "Whether the National Labor Relations Act preempts state common law tort claims filed by one labor union against another for intentional, malicious, and outrageous conduct *that caused substantial economic damages which the National Labor Relations Board does not have the authority to remedy*, simply because the conduct was arguably prohibited by the National Labor Relations Act?" Petition at i (emphasis added).

would constitute an intolerable interference with the federal scheme. *See Garmon*, 359 U.S. at 246-47; *Jones*, 460 U.S. at 684.

The Third Circuit correctly held that PNA's claims were preempted—first, because the conduct on which they were based was "arguably prohibited" under the NLRA, and because neither the "peripheral concern" nor the "local feeling" exception applied; and alternatively because, in view of the substantial overlap between the state and federal claims, the risk of interference with the regulatory jurisdiction of the NLRB outweighed the state interests involved. In both instances, the Third Circuit straightforwardly applied existing law to the facts of this case. The result it reached was correct and does not merit review by this Court.

III. PNA DOES NOT CONTEND THAT THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PRIMARY BASIS FOR THE THIRD CIRCUIT'S DECISION, AND THERE IS NO CONFLICT EVEN WITH REGARD TO THE QUESTION AS TO WHICH PNA SEEKS REVIEW

PNA asks this Court to grant review because, *inter alia*, "[t]he Third Circuit's decision in this case establishes a mature conflict concerning the formulation and application of the *Sears* 'identical controversy test.'" Petition at 17. PNA's reliance on this alleged conflict is misplaced for two independently dispositive reasons.

In deciding this case, the Third Circuit applied this Court's three-prong test for NLRA preemption. PNA does not take issue with the court's formulation of that test, and does not suggest that there is any conflict among the Circuits in this regard.

In applying the test, the court below did not find it necessary to reach the third prong in order to dispose of this case. It was able to affirm the decision of the district court by concluding that the conduct underlying PNA's

state-law tort claims arguably was prohibited by the NLRA (the first prong), and that the conduct did not come within either of the two recognized exceptions to the preemption doctrine (the second prong). *See* App. A-9-12. The Third Circuit's application of these two prongs of the preemption test to the facts of this case clearly does not present any *legal* issue as to which there is a certworthy conflict among the Circuits, and PNA does not contend otherwise.

As noted, the court below reached the third prong of the preemption test—and addressed the question of whether allowing PNA to proceed with its state-law tort claims impermissibly would infringe on the jurisdiction of the NLRB—only in connection with the analysis underlying the alternative, and secondary, basis for its decision. App. A-12-15. PNA contends that it is the correctness *vel non* of this analysis as to which there is a conflict among the Circuits.

Even if there were such a conflict (which, as we demonstrate below, there is not), this case would provide an inappropriate vehicle for resolving it, inasmuch as the challenged analysis was not necessary to the Third Circuit's primary holding. But PNA's argument fails even on its own terms: there is in fact no conflict among the Circuits with regard to the formulation and application of the third prong of this Court's preemption test.

PNA cites four cases as evidence of an alleged conflict: *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1427 (7th Cir. 1995); *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1470 (5th Cir. 1993), *cert. denied*, 510 U.S. 1117 (1994); *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1417 (9th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993); and *Windfield v. Groen Div.*, 890 F.2d 764, 768 (5th Cir. 1989). According to PNA, the courts in these cases allowed state-law tort claims "similar to PNA's" to go forward "because the interests protected and the reme-

dies requested in both the state court and NLRB proceedings were different even though the two proceedings shared a common factual basis." Petition at 18. PNA misstates the teaching of these cases.

In each of the cases upon which PNA relies, the court found that there simply was no significant "common factual basis" between the state-law tort claims and the unfair labor practice charges that could have been, but were not, brought before the NLRB on the basis of the same underlying conduct. Indeed, in *Loewen* and *Milne*, the courts found that the conduct in question did not provide the predicate for unfair labor practice charges, and the holdings of nonpreemption rested upon the conclusion that the conduct was not even "arguably prohibited" by the NLRA. *See Loewen*, 65 F.3d at 1426 ("We find therefore that Haberichter will be unable to demonstrate that Loewen's conduct is arguably prohibited under § 8 of the NLRB [sic]."); *Milne*, 960 F.2d at 1414-16, 1417 (concluding that the conduct underlying plaintiffs' tort claims did not arguably constitute either bad-faith bargaining or direct bargaining proscribed by the NLRA).[7]

Although the conduct in question was held to be arguably prohibited in the other two cases cited by PNA, it was the lack of significant overlap in the factual underpinnings of the tort and NLRA claims that was fatal to NLRA preemption. In *Etie*, an employer asserted, *inter alia*, claims of fraud and breach of fiduciary duty against a union and a multiemployer association, alleging that the union and the association had attempted to drive the

[7] The passages from these cases to which PNA cites are dicta, in which the courts briefly noted that "even if" the conduct in question were arguably prohibited by the NLRA, they would still decline to find the state-law claims preempted. *See Loewen*, 65 F.3d at 1426-27; *Milne*, 960 F.2d at 1416-17 ("Even if we accepted defendants' argument that its alleged misrepresentations or concealment is arguably prohibited by § 8 . . . ."); *id.* at 1417-18 ("In any event, even assuming that the alleged misrepresentations arguably constituted direct bargaining . . . .").

employer out of business by forcing it to abide by an interest-arbitration provision the association had agreed to, and had enforced against the employer, without the employer's authorization. *See* 1 F.3d at 1468-69. The court found that the factual questions that would have to be decided in order to resolve the state-law tort claims were significantly different from those that would have been addressed under the NLRA. Whereas the tort claims focused on the employer's grant of authority to the association, unfair labor practice charges alleging impermissible support by an employer of a labor organization, or unlawful interference with the employees' right to choose their collective bargaining representative, would focus on the impact of the agreement entered into pursuant to the grant of authority. The latter focus, the Court opined, raised a wholly separate question that "presuppose[d] the question of power to enter the agreement at issue in the state claims" and "d[id] not answer the state law questions." *Id.* at 1470.

Similarly, in *Windfield,* where an employee brought claims based on an alleged individual contract of employment entered into during a union organizing campaign, *see* 890 F.2d at 765-66, the court found that preemption was not required simply because "some common facts may be relevant to both NLRB and state court proceedings." *Id.* at 770. Unlike the situation in *Jones, supra,* in which this Court "concluded that the proof required for [the] state law claim . . . overlapped too much with that for an unfair labor practice charge," 890 F.2d at 770, the Fifth Circuit found in *Windfield* that the factual "overlap will be tangential to the legal issues within the purview of the NLRB and state law." *Id.*

In short, in each of the four cases upon which PNA relies, preemption arguments were rejected because, on the specific facts before them, the courts concluded either that the conduct at issue was not even "arguably prohibited" under the NLRA, or that—contrary to PNA's contention—the legal issues raised by the state-law claims and the

NLRB proceedings would not have "shared a common factual basis." Petition at 18. These holdings are in no way inconsistent with the result reached by the Third Circuit in applying the third prong of the *Garmon/Belknap* preemption test to the facts of this case. Accordingly, even with regard to the question as to which PNA seeks review—which, as we have shown, is not appropriately presented by this case—there is no conflict among the Circuits that warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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